STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

Carmelthia Otis, et. al,	)	
	)	
Charging Parties	)	
	)	
and	)	Case No. L-CB-06-035-C
	)	
Chicago Joint Board, Local 200, Retail, Wholesale and Department Store Union,	)	
	)	
Respondent	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD LOCAL PANEL

On October 17, 2013, Administrative Law Judge Michelle N. Owen issued a Recommended Compliance Decision and Order in the above-captioned case, recommending that the Illinois Labor Relations Board, Local Panel (Board) find that the Chicago Joint Board, Local 200, Retail, Wholesale and Department Store Union (Respondent) had not complied with the Board's May 19, 2010, Decision and Order issued in this same matter directing Respondent to recalculate, properly and accurately, the distribution of a $375,000 overtime grievance award and pay Charging Parties the amounts due them after proper recalculation of that award, including interest thereon at the rate of 7% per annum.

Respondent and Charging Parties filed timely exceptions to the Recommended Decision and Order pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240. Neither party filed a response.[1] After reviewing the record, and

[1] On February 4, 2014, eleven weeks after it filed its exceptions, Respondent requested oral argument. Finding the issues are not so complex as to warrant further delay in resolving this matter, the Board denies that request.

exceptions, we adopt the Administrative Law Judge's Recommended Decision and Order and direct Respondent to pay each of the individual Charging Parties the sum of money owed them as set forth in footnote 5 and the appendix of the Administrative Law Judge's Recommended Compliance Decision and Order plus 7% annual interest on the base overtime amount owed each of the Charging Parties for the period from July 31, 2012, to the date that Respondent complies with this order.[2]

BY THE LOCAL PANEL OF THE ILLINOIS LABOR RELATIONS BOARD[3]

/s/ Robert M. Gierut
Robert M. Gierut, Chairman

/s/ Richard A. Lewis
Richard A. Lewis, Member

Decision made at the Local Panel's public meeting in Chicago, Illinois, on February 13, 2014; written decision issued at Chicago, Illinois, February 28, 2014.

[2] In footnote 5, the Administrative Law Judge determined that Respondent owes Christina Ohaeri-Enyzeau $32,203.05 plus 7% interest. Charging Parties' sole exception to the Administrative Law Judge's recommended order is that the amount determined to be owed to Ohaeri-Enyzeau was incorrect. Charging Parties' exception is based on overtime records that were not offered into evidence in the proceeding before the Administrative Law Judge. As we will only consider the evidentiary record that served as the basis for an administrative law judge's recommendation, we must reject Charging Parties' exception.

[3] Member Anderson did not participate in the Board's discussion and ruling in this matter.

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	)	
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ADMINISTRATIVE LAW JUDGE'S RECOMMENDED COMPLIANCE DECISION AND ORDER

I. INTRODUCTION

On March 28, 2006, Carmelthia Otis, et. al. (Charging Parties) filed an unfair labor practice charge with the Local Panel of the Illinois Labor Relations Board (Board) alleging that the Chicago Joint Board, Local 200, Retail, Wholesale and Department Store Union (Respondent or Local 200) had violated Section 10(b) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), as amended (Act), by failing in its duty to fairly represent employees at Provident Hospital in a grievance concerning overtime.

On July 1, 2009, after a hearing on the complaint, Administrative Law Judge (ALJ) Sharon Wells, in a Recommended Decision and Order, determined that the Respondent had violated its duty of fair representation to the Charging Parties, members of its bargaining unit who are employed as pharmacists at Provident Hospital, in violation of Section 10(b)(1) in its

[1] Employees named as the "Charging Parties" in Administrative Law Judge Wells's Recommended Decision and Order, the Local Board's Decision and Order, and the Appellate Court Decision were Carmelthia Otis, Delcina (Simmons) Rosado, Brian McBride, Christiana Ohaeri-Enyzeau, Marshall Berry, Boniface Nwanesi, Gabriel Nwandu, Ashok Gandi, Linda Hampton, Nayan Raval, Dhirajlal Jagatia, and Synthia Miller. Employees not included by Charging Parties in the subsequent Petition for Enforcement were Linda Hampton, Nayan Raval, and Synthia Miller.

handling and distribution of the grievance arbitration award. She recommended a number of remedies including ordering the Respondent to pay the Charging Parties the amounts owing to them after recalculation of the $375,000.00 arbitration award. Thereafter, pursuant to Section 1220.60 of the Board's Rules and Regulation, 80 Ill. Admin. Code §§ 1200-1220 (Rules), the Respondent filed timely exceptions to the ALJ's Decision and Order, to which the Charging Parties did not file responses.[2]

On May 19, 2010, the Board issued a Decision and Order accepting the ALJ's recommendation that the Respondent violated Section 10(b)(1) of the Act and ordering the Respondent to recalculate, properly and accurately, the distribution of the $375,000.00 award. Chicago Joint Bd., Local 200 (Otis, et al.), 26 PERI ¶ 45 (IL LRB-LP 2010).

The Respondent petitioned the Illinois Appellate Court to review the Board's decision, and in an unpublished order, issued May 18, 2011, the Court affirmed the Board's Decision and Order. Chicago Joint Bd., Local 200, Retail, Wholesale and Dep't Store Union v. Ill. Labor Relations Bd., Local Panel, No. 1-10-1497, 2011 IL App (1st) 101497. On June 22, 2011, the Court issued its mandate.

On September 23, 2011, the Charging Parties filed a Petition for Enforcement with the Board, requesting that it begin proceedings to enforce the Board's May 19, 2010 Order. As a result, the Board's compliance officer, Michael Provines, began an investigation of the matter. On June 28, 2012, (with an Erratum filed on July 3, 2012), the Compliance Officer issued a compliance order setting forth in detail the amounts owing to the Charging Parties after

[2] However, Charging Parties filed a fee petition on August 3, 2009. The Respondent then filed a memorandum in opposition to Charging Parties' fee petition on September 2, 2009. The Respondent had also requested oral argument in its exceptions, however they were denied by the Board because the issues presented by the matter were "not so novel or difficult as to make oral argument advisable."

recalculation of the $375,000.00 to restore them to the position they would have been in absent the Respondent's violation of the Act.

On July 18, 2012, pursuant to Section 1220.80(e) and (f) of the Rules, the Respondent and the Charging Parties each filed objections to the Compliance Order. Accordingly, pursuant to Section 1220.80(f), the matter was set for hearing before the undersigned. A hearing was conducted on October 11, 2012 and November 2, 2012, in Chicago, Illinois at which time all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs. After full consideration of the evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following.

II. ISSUES AND CONTENTIONS

The issue in this case is whether the Compliance Officer properly and accurately recalculated the distribution of the overtime grievance arbitration award, and as a result correctly determined the amounts due to the Charging Parties.

The Respondent objects to the Compliance Order arguing that it has fully complied with the Board's May 19, 2010 Order because it has provided the Charging Parties with the opportunity to present claims and evidence in support of their assertion that they lost overtime opportunities and were economically harmed by the Employer's violation of the collective bargaining agreement. The Respondent argues that since the Charging Parties have not submitted evidence to show that they lost overtime opportunities or were economically harmed, they are owed nothing from the proceeds of the arbitration award. The Respondent asserts that the Compliance Order erroneously stated that the Board had already determined that the Charging Parties were necessarily entitled to a specific or any monetary remedy. The Respondent objects to the Compliance Order's assumption that all pharmacists lost overtime

opportunities and to the use of a formula that assumed all bargaining unit pharmacists overtime hours were adversely affected.

The Charging Parties object to the Compliance Officer's recalculation and distribution of the arbitration award arguing that the formula he used to determine the amounts due to the Charging Parties should not have included the overtime hours of pharmacists other than the Charging Parties. Further, the Charging Parties claim that the overtime records are in part fraudulent and the remainder highly suspect. In addition, the Charging Parties assert that the formula used by the Compliance Officer is "purely speculative." The Charging Parties argue that the arbitration award should be divided into equal parts among each of the Charging Parties, so that each of the Charging Parties receives an equal amount. In the alternative, the Charging Parties assert that the award should be recalculated using the Compliance Officer's formula but excluding the overtime hours of employees other than the Charging Parties. Lastly, the Charging Parties argue that the Compliance Officer erroneously calculated the pay outs due to the Charging Parties based on a total award and interest of $201,140.80, when the total award and interest was actually $534,015.10 plus interest.

III. FACTS

A. Overtime Grievance, Arbitration Award, and Consent Order

At all times relevant, the Charging Parties were employed by the County of Cook, Provident Hospital (Employer), in various pharmacist titles. The Charging Parties were members of a bargaining unit represented by Local 200 that included all pharmacists employed at Provident Hospital and Stroger Hospital. On June 9, 2000, George Leonard, a pharmacist at Stroger Hospital and the president of Local 200, filed a grievance which alleged that the Employer was having persons other than bargaining unit pharmacists perform work at Provident

Hospital. The matter proceeded to arbitration, and on October 28, 2003, Arbitrator Daniel Nielsen issued an award finding that the Employer had a management contract with McKesson, Inc. for the provision of pharmacy supervision and management services and that some of the McKesson personnel were themselves pharmacists. He noted that McKesson personnel performed bargaining unit work routinely and on a daily basis at Provident. He noted that in June 2000, the County had stopped authorizing overtime for pharmacists from other hospitals to help out at Provident. He found that the Employer violated the collective bargaining agreement by having persons other than Local 200 pharmacists do pharmacy work at Provident Hospital without prior notice to or negotiations with Local 200. He ordered the County to "cease and desist from having persons other than Local 200 Pharmacists do pharmacy work at Provident Hospital without prior notice to and negotiations with the Union, and to make affected employees whole." The award also directed the Employer and the Respondent to meet and confer over the scope and amount of the remedy.

On September 16, 2005, the Employer and Local 200, through its agent Leonard, entered into a consent order, which provided that the Employer would pay the affected employees a total not to exceed $375,000.00, no later than March 19, 2006. Attached to the order was a list of the fourteen employees found to have been harmed by the Employer's actions and the amount each affected employee was to receive.[3] None of the Charging Parties were listed on the order.

B. Unfair labor practice charge

[3] The employees who received awards were as follows: Teresita Belcina (Stroger Hospital) $16,301.60; Frederick Carter (Stroger) $28,985.85; George Leonard (Stroger) $88,941.97; Joseph Arrington (Stroger) $33,025.76; Kiran Nanavati (Stroger) $23,602.51; Hilliard Moore (Provident) $39,681.36; Denise Davis (Provident) $64,346.82; Lilia Lenaflorida (Stroger or Cermak) $42,328.25; Regina Gordon (Cermak) $21,213.54; Rubina Anees (Stroger) $1,685.92; Simeon Okonmah (Stroger) $9,332.64; Harilar Thakkar (unknown) $3,867.91.

On March 28, 2006, the Charging Parties filed an unfair labor practice charge with the Board, arguing that the Respondent violated its duty of fair representation to the Charging Parties, in violation of Section 10(b)(1), in its handling and distribution of the $375,000.00 arbitration award. The Charging Parties contended that Leonard, who was solely responsible for determining which employees would receive a portion of the arbitration award and for calculating the amount that each employee would receive, manipulated the process to benefit himself and his co-workers at Stroger to the detriment of Provident pharmacists. In response, the Respondent argued that the overtime grievance had only remedied the loss of overtime opportunities at Provident for pharmacists who were regularly employed at Stroger, and as a result, Provident pharmacists were not entitled to any of the proceeds from the award.

ALJ Wells conducted a hearing on the matter, and on July 1, 2009 issued a recommended decision and order finding that Local 200 had violated Section 10(b)(1) of the Act when it, through Leonard, excluded the Charging Parties from receiving any of the proceeds from the arbitration award in retaliation for the Charging Parties' support of Leonard's rival for Local 200 president, for voting down a tentative agreement Leonard had negotiated, and for their complaints regarding the work of Leonard and other pharmacists from Stroger. She also found no merit to the Respondent's contention that Provident pharmacists were not entitled to any of the proceeds from the award. ALJ Wells noted that Leonard's testimony was contradictory and not credible in many respects. She specifically noted that Leonard's assertion that he had worked 2200 hours of overtime in 1999 was "unworthy of belief." She recommended the following remedies:

> (1) Notify the Charging Parties that it will not refuse to include them in grievance arbitration awards because they engaged in activities perceived hostile to George Leonard.

(2) Notify in writing all members of the bargaining unit to submit claims if they believe they lost overtime opportunities at Provident during the period of 2000 to 2004. Provide the Board with proof that they have so notified all bargaining unit members in writing.

(3) Respondent shall pay the Charging Parties the amounts owing to them after recalculation of the arbitration award based on the amount originally paid out by the Employer, $375,000. The amount shall be paid with interest calculated at the rate of seven percent per annum as allowed by the Act, beginning as of the time of the payout of the arbitration award in 2006 until the date of being made whole.

C. Board's Decision and Order

On May 19, 2010, the Board accepted the ALJ's Decision and Order, agreeing with her conclusion that the Respondent violated Section 10(b)(1) by excluding the Charging Parties from receiving any proceeds from the arbitration award in retaliation for engaging in activities perceived hostile to Leonard. The Board also rejected the Respondent's argument that the overtime grievance only remedied the loss of overtime opportunities for pharmacists regularly employer at Stroger. The Board noted that the arbitrator's decision had "expressly covered all the pharmacists in the bargaining unit" and thus, the Board found the Respondent's claim that Provident pharmacists were not entitled to any of the proceeds was without merit. The Board ordered the Respondent to take the following actions:

1. recalculate, properly and accurately, the distribution of the $375,000 overtime grievance award;

2. pay Charging Parties the amounts due them after proper recalculation of the $375,000 overtime grievance award, including interest thereon at the rate of seven percent per annum, in accordance with Section 11(c) of the Illinois Public Labor Relations Act, from the date of the payout of the award in 2006, until such time as Charging Parties have been made whole;

On May 18, 2011, the Appellate Court affirmed the Board's Decision and Order.

D. Petition for Enforcement & Compliance Investigation

On September 23, 2011, the Charging Parties filed a Petition for Enforcement with the Board asserting that the Respondent had not taken the steps necessary to comply with the Board's Order. Specifically, the Charging Parties asserted that the Respondent had not recalculated and distributed the proceeds from the $375,000.00 overtime grievance award as ordered by the Board.

During the compliance investigation, the Respondent defended its action by asserting, as it had done before the ALJ and the Board, that the Charging Parties had not lost overtime opportunities during the back pay period, and thus they were not entitled to proceeds from the arbitration award. The Respondent argued that Stroger pharmacists were not allowed to work overtime at Provident from 2000 to 2004 and therefore there was "at least a minimally sufficient basis" to conclude that Stroger pharmacists were impacted by the overtime assignment practices more than the Charging Parties. The Respondent also argued that, compared to 1999, the Charging Parties collectively worked more overtime as a group during the five year back pay period, and therefore, if there was a deviation of individual Charging Parties working less overtime during the back pay period, then it must have been by choice because any overtime work performed by Provident pharmacists was voluntary.

During the investigation, the Charging Parties argued that the arbitration award should be distributed among nine of the original Charging Parties, in the following amounts: Delcina (Simmons) Rosado, $60,000.00; Carmelthia Otis, $60,000.00; Gabriel Nwandu, $50,000.00; Brian McBride, $50,000.00; Christina Ohaeri-Enyzeau $40,000.00; Boniface Nwanesi, $40,000.00; Ashok Gandi, $40,000.00; Dhirajlal Jagatia, $40,000.00; and Marshall Berry, $40,000.00. The Charging Parties asserted that this recommended distribution was based on the fact that pharmacists at Provident had worked most of the overtime hours, and therefore they

were entitled to a larger distribution of the arbitration award. The Charging Parties also contended that the employees who were involved in the underlying grievance and the appeal proceedings were entitled to a larger distribution of the proceeds. The Charging Parties noted that Linda Hampton and Nayan Raval had withdrawn their claims as charging parties. Further, the Charging Parties noted that Synthia Miller had left Provident prior to 2006, and her name had thus been dropped by the remaining Charging Parties when the Petition for Enforcement was filed.

E. Compliance Order

On June 28, 2012, after the compliance investigation, the Board's Compliance Officer issued a compliance order. Initially, the Compliance Order noted that the Respondent's argument that the Charging Parties lost no overtime opportunities during the back pay period, and thus were not entitled to any proceeds from the award was the same argument that had been already rejected by the Board. The Compliance Officer stated that "it is wholly inappropriate to relitigate the merits of such evidence and argument the Board has previously considered and rejected." The Compliance Officer noted that the Board's Order held that the Respondent had discriminatorily excluded the Charging Parties from receiving any portion of the $375,000.00 arbitration award in retaliation for the Charging Parties' activity perceived hostile to Leonard. The Compliance Officer stated that the "general principle underlying this investigation is simply to restore the Charging Parties to the position they would have been in absent the commission of Respondent's unfair labor practice of discriminating; not to relitigate the merits of the evidence and arguments."

Next, the Compliance Officer found that the Charging Parties' recommended distribution was "just as inequitable and discriminatory as Respondent's distribution procedure." He noted

that participation by a charging party in the grievance and unfair labor practice proceeding was "no more an appropriate criterion to adopt a back pay formula than Respondent's method that discriminatorily excluded Provident pharmacists from receiving proceeds because they drew the ire of Union president Leonard."

The Compliance Officer then noted that the Respondent had complied with his directive to write to each of the Charging Parties and to post notices as directed by the Board.[4] The Compliance Officer noted that he had initially directed the Respondent to develop a fair and equitable methodology for recalculating and distributing the award, which would result in a reasonable approximation of the amount of overtime that members lost during the period between 2000 through 2004. The Compliance Officer went on to explain that "[a]fter it became apparent Respondent was not of the opinion Charging Parties were owed any proceeds from the settlement, I directed Respondent to contact the employer to obtain the overtime hours worked by each bargaining unit employee employed at Provident in 1999, the year prior to when the bargaining unit work was performed by non-bargaining unit personnel." The Compliance Officer noted that he also requested that the Respondent obtain the overtime hours each bargaining unit employee had worked during the period from 2000 through 2004, since this was the time period in which the Employer had assigned non-bargaining unit members to perform work at Provident.

The Compliance Officer found that although the Respondent had complied with his directive to contact the Employer and the Respondent had been able to provide him with most of the information he had requested, some information was still not provided or was incomplete.

[4] The Board ordered the Respondent to "notify Charging Parties, in writing, that it will not retaliate against them based on the candidates they choose to support in elections for Union office; . . . based on the initiatives they choose to support in ratification votes; . . . based on their complaints regarding the work of Leonard, or other pharmacists from Stroger Hospital, when working overtime at Provident Hospital."

The Compliance Officer noted that, according to the Respondent, the Employer did not maintain records identifying the location where employees performed their overtime hours. The Compliance Officer stated that this factor "complicated an analysis of the data because it was not possible to identify whether employees who worked overtime did so at Provident or at Stroger Hospital." He noted that even if this information were available and fully analyzed, it would be "virtually impossible to create a formula that could predict the amount of overtime lost with any degree of precision."

The Compliance Officer ultimately found that both the Respondent's and the Charging Parties' recommended distribution methods were unhelpful in developing an equitable formula because neither method assumed that all pharmacists lost overtime. The Compliance Officer noted that "in order to achieve equity," the most reliable, equitable, and reasonable formula would assume that all bargaining unit pharmacists lost overtime opportunities.

The Compliance Officer noted that a common method for projecting back pay and reaching compliance is the projection of average earnings formula. This formula estimates gross back pay by projecting over the back pay period the earnings or hours worked by a charging party during a representative period prior to the adverse action. He noted that this formula is "simple, easy to use and is reasonably accurate." He explained that this formula "rests on the speculative assumption that past work history is an accurate predictor of future work history." He found that "although the formula is normally used to project earnings, there is no reason the same formula cannot be used to determine overtime projections."

In calculating the amount of back pay due, the Compliance Officer noted that he excluded from receiving proceeds employees who had already received proceeds from the award as originally distributed by Leonard, however their overtime hours were included to establish the

total amount of overtime hours worked. Finally, he noted that "[h]owever inexact the representative formula is in determining back pay, under these circumstances it is the best safeguard for the rights of Charging Parties for the Union's discriminatory action."

Using the projection of average earnings formula, the Compliance Officer computed the total number of overtime hours worked by all pharmacists in 1999, the year prior to non-bargaining unit employees performing bargaining unit work. He noted that the total number of overtime hours that pharmacists worked in the year 1999 equaled 13324.2 hours. He then divided the total number of overtime hours worked by an individual employee in 1999 by the total number of overtime hours worked by all pharmacists to arrive at the percentage of time the individual worked in 1999. He then multiplied that percentage by $375,000.00, to obtain a dollar amount that was owed to each of the Charging Parties.

Thus, the Compliance Officer used the following formula for determining the amount of back pay owed to each Charging Party: (total number of overtime hours worked by individual employee ÷ total number of overtime hours worked by all pharmacists) × ($375,000.00) = back pay owed to employee.

The Compliance Officer then set forth the formula he used to compute the amount of interest due on the back pay. The formula he used is based upon a 360-day calendar year (rather than 365 days) with simple per annum interest statutorily set at 7%. Thus, the daily interest rate factor is 0.0001944 (or 7% ÷ 360 days). He noted that this interest formula has long been used by the Board in compliance cases. He explained that with this formula, interest accrues beginning with the last day of each calendar year for the back pay period on the amount due and owing for each annual period and continuing until reaching full compliance.

The Compliance Officer noted that here the back pay period began on March 19, 2006, as directed by the Board's Order, and ended on July 31, 2012, the projected date that the redistributed award would be paid to the Charging Parties. Thus, the total number of days in the back pay period equaled 2,299 days. He noted that the amount of interest due would be subject to change based on the date when the Charging Parties are actually paid by the Respondent, as the interest would continue to run on the net back pay until such date was confirmed.

Thus, the Compliance Officer used the following formula for determining the amount of interest owed to each Charging Party: (daily interest rate factor (0.0001944.90)) × (number of days in the back pay period (2,299)) × (back pay owed to employee) = interest.

The Compliance Order included an appendix, marked Appendix A, to the Compliance Order, which included a table displaying the number of overtime hours that each affected employee worked from 1999-2004, the percentage of overtime the employee worked, the amount of back pay owed to the employee, and the amount of interest owed to the employee. Appendix A is also attached to this recommended decision and order.

The Compliance Officer then set forth the amounts that were owed to the Charging Parties after computing the back pay and interest formulas:

> Carmethelia Otis – Otis worked 1,047.2 overtime hours in 1999. The overtime hours represent 7.86% of the total overtime hours worked by pharmacists in 1999 (13,324.2 total all overtime hours). Respondent owes Otis $29,475.00 (7.86% x $375,000.00) in redistributed settlement proceeds. Respondent owes Otis $13,173.13 in interest (.0001944 daily interest factor x 2,299 days of interest x $29,475.00 back pay = $13,173.13). Respondent is ordered to pay Otis a total of $42,648.13 ($29,475.00 + $13,173.13).
>
> Delcina Simmons Rosado – Rosado worked 779.4 overtime hours in 1999. The overtime hours represent 5.85% of the total overtime hours worked by pharmacists in 1999 (13,324.2 hours or total of all overtime worked by pharmacists). Respondent owes Rosado $21,937.50 (5.85% x $375,000.00) in redistributed settlement proceeds. Respondent owes Rosado $9,804.43 in interest (.0001944 daily interest factor x 2,299 days of interest x $21,937.50 back pay

=$9,804.43). Respondent is ordered to pay Rosado a total of $31,741.93 ($21,937.5 + $9,804.43).

Marshall Berry – Berry worked 796 overtime hours in 1999. The number of overtime hours represent 5.97% of the total overtime hours worked by pharmacist in 1999 (13,324.2 hours total of all overtime hours worked by pharmacists). Respondent owes Berry $22,387.50 (5.97% x $375,000.00) back pay in redistributed settlement proceeds. Respondent owes Berry $10,005.55 in interest (.0001944 daily interest factor x 2,299 days of interest x $22,387.50 back pay = $10,005.55). Respondent is ordered to pay Berry a total of $32,393.05 ($22,387.50 + $10,005.55).

Gabriel Nwandu – Nwandu worked 662.4 hours in 1999. This represents 4.97% of the total overtime hours worked by pharmacists in 1999 (13,324.2 hours total of all overtime hours worked by pharmacists in 1999). Respondent owes Nwandu $18,637.50 (4.97% x $375,000.00) back pay in redistributed settlement proceeds. Respondent owes Nwandu $8,329.58 in interest (.0001944 daily interest factor x 2,299 days of interest x $18,637.50 back pay = $8,329.58). Respondent is ordered to pay Nwandu a total of $26,966.87 ($18,637.50 + $8,329.58).

Dhirajlal Jagatia – Jagatia worked 367.2 hours in 1999. This represents 2.76% of the total overtime hours worked by pharmacists in 1999 (13,324.2 hours total of all overtime hours worked by pharmacists in 1999). Respondent owes Jagatia $10,350.00 (2.76% x $375,000.00) back pay in redistributed settlement proceeds. Respondent owes Jagatia $4,625.68 in interest (.0001944 daily interest factor x 2,299 days of interest x $10,350.00 back pay = $4,625.68). Respondent is ordered to pay Jagatia a total of $14,975.68 ($10,350.00 + $4624.68).

Boniface Nwansei – Nwansei worked 385.6 hours in 1999. The percentage represents 2.89% of the total overtime hours worked by pharmacists in 1999 (13,324.2 hours). Respondent owes Nwansei $10,837.50 (2.89% x $375,000.00) back pay in redistributed settlement proceeds. Respondent owes Nwansei $4,843.56 in interest (.0001944 daily interest factor x 2,299 days of interest x $10,837.50 back pay). Respondent is ordered to Nwansei a total of $15,681.06 ($10,837.50 + $4,843.56).

Brian McBride – McBride worked 129.9 overtime hours in 1999. The percentage represents .0097% of the total overtime hours worked by pharmacists in 1999 (13,324.2 hours). However, I adjusted the percentage by a 20% reduction (.0097 x .20% = .0078%) because McBride retired in 2003 and worked only 4 of the 5 back pay years. Respondent owes McBride $2,925.00 in back pay (.0078% x $375,000.00) Respondent owes McBride $1,307.26 in interest (.001944 daily interest factor x 2,299 days of interest x $2,925.00). Respondent is ordered to pay McBride a total of $4,232.26 ($2,925.00 + $1,307.26).

Ashok Ghandi – It is uncertain when Respondent employed Ghandi, however, the first year that is documented he worked overtime was some time in 2001. Since there is no documentation that he worked overtime in 1999, the base year for establishing the percentage of overtime used to redistribute the grievance settlement, a different methodology was used to calculate back pay. From 2001 through 2004, Ghandi worked 4,416 hours of overtime. The only pharmacist that worked more overtime than Ghandi during this timeframe was Carmethelia Otis who worked 5,027.3 hours of overtime. The next most overtime hours worked by a Provident pharmacist during that four year period was Delcina Simmons Rosado who worked 2,821.7 hours of overtime. Because pharmacists Otis and Rosado were comparable to Ghandi in the number of overtime hours worked, they serve as a representative sample of pharmacists to establish a formula to estimate Ghandi's back pay. The percentage of overtime Otis and Rosado worked in 1999 was 7.86% and 5.85%, respectively. These two percentages of overtime worked were totaled and divided by 2 to equal the percentage (6.86%) and used to approximate the amount of overtime that Ghandi would have worked in 1999. Since Ghandi only worked four years during the back pay period the percentage of 6.86% was reduced by 20% to reflect the shortened pay period, or 5.49%. Respondent owes Ghandi $20,587.50 (5.49% x $375,000.00). Respondent owes Ghandi $9,201.08 interest (.0001944 daily interest factor x 2,299 days of interest x $19,312.50 back pay = $9,201.08). Respondent is ordered to pay Ghandi a total of $29,788.58 ($20,587.50 + 9,201.08).

Synthia Miller – Charging Parties excluded Miller from receiving a portion of the award because she is no longer employed at Provident. However, there is no evidence she voluntarily chose to remove herself from the original filing and therefore is eligible to receive a portion of the award as set forth herein. It is uncertain when Respondent employed Miller; however, the first year that is documented that she worked overtime was some time in 2002. Miller worked 39.1 hours of overtime in 2002 and 210.6 overtime hours in 2003. The amount of overtime hours Miller worked is similar to the amount of hours Linda Hampton worked during 2002 and 2003. The percentage of overtime Hampton worked in 1999 was 1.23%, which was the base percentage used for Miller but had to be adjusted for the limited time that Miller worked overtime in the back pay period. Since Miller worked two of the five years her percentage 1.23% was adjusted by multiplying the percentage by 60% [sic]. Her adjusted percentage is .005%. Respondent owes Miller $1,875.00 in back pay (.005% x $375,000.00). Respondent owes Miller $837.99 in interest (.0001944 daily interest factor x 2,299 days of interest x $1,875.00 back pay = $837.99). Respondent is ordered to pay Miller $2,712.99 ($1,875.00 + 837.99).

Christiana Ohaeri-Enyzeau – Except for 2004, when Ohaeri-Enyzeau worked 580.7 hours of overtime, Respondent was unable to document overtime for any other years. There is no question that Ohaeri-Enyzeau was employed prior to 1999, and had worked overtime in 1999 and throughout the back pay period. It is herein ordered Respondent obtain Ohaeri-Enyzeau's overtime records for 1999

through 2004 and determine her overtime percentage by dividing the overtime she worked in 1999 by 13,324.2 total hours of overtime. If Respondent is unable to obtain the proper documentation to determine the number of hours Ohaeri-Enyzeau worked in 1999, unless Respondent and Charging Parties are able to agree on the amount of overtime, then the parties are ordered to fully brief the amount Respondent owes, if any, to be heard upon appeal before an Administrative Law Judge determined by the Board.

IV. DISCUSSION AND ANALYSIS

I find that the Compliance Officer properly and accurately recalculated the distribution of the arbitration award, and as a result correctly determined the amounts due to the Charging Parties.[5]

The Board's compliance procedures are set forth in Section 1220.80 of the Board's Rules. Section 1220.80(c) and (d) of the Rules state:

> (c) The compliance officer shall investigate the information in the petition [for enforcement] and shall issue and serve upon the parties, no later than 75 days after the filing of the petition, an order dismissing the petition, directing specifically the actions to be taken by the respondent or setting the matter for hearing before an Administrative Law Judge.
>
> (d) If a party fails or refuses to respond to a compliance officer's request for information, the compliance officer shall make the determinations based on the evidence presented.

[5] In regard to Christina Ohaeri-Enyzeau, the parties failed to brief, before the undersigned, the amount that the Respondent owed, if any, as directed by the Compliance Order. The Compliance Officer had stated that the Respondent was unable to document Ohaeri-Enyzeau's overtime for any year other than 2004, when Ohaeri-Enyzeau worked 580.7 hours of overtime. I find that in order to determine the amount due to Ohaeri-Enyzeau, the use of a comparable or representative employee is appropriate, as the Compliance Officer used in determining the amounts due to Ashok Gandi and Synthia Miller. Performance Friction Corp., 335 NLRB 1117, 1117 (2001), citing NLRB v. S.E. Nichols of Ohio, Inc., 704 F.2d 921, 924 (6th Cir. 1983), cert. denied 464 U.S. 914 (1983); NLRB Casehandling Manual (Part Three) Compliance, Section 10562.4 (2007). Ohaeri-Enyzeau worked 580.7 hours of overtime in 2004. The amount of overtime hours Ohaeri-Enyzeau worked in 2004 is very similar to the 594 overtime hours that Marshall Berry worked in 2004. The Compliance Order directed the Respondent to pay Berry a total of $32,393.05 based on an overtime percentage of 5.97%. Thus, using the Compliance Order's methodology and formula, the Respondent owes Ohaeri-Enyzeau $32,393.05, which is to be modified based only to the extent necessary to reflect the additional interest which has accumulated on the back pay award.

The purpose of a back pay remedy is to restore discriminatees to the status they would otherwise occupy but for the respondent's discrimination. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); Sure-Tan Inc. v. NLRB, 467 U.S. 883, 899 (1984). Thus, a back pay remedy must be "sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Sure-Tan, 467 U.S. at 900. Likewise, a back pay remedy should make the affected employee whole, but should not place the employee in a better position than he would have been in had the unfair labor practice not occurred. Diamond Walnut Growers, Inc., 340 NLRB 1129 (2003); Freeman Decorating Co., 288 NLRB 1235 (1988).

"Determining what would have happened absent a respondent's unfair labor practices, however, is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat different result. Accordingly, the General Counsel is allowed wide discretion in selecting a formula." Alaska Pulp Corp., 326 NLRB 522, 523 (1998), citing Woodline Motor Freight, Inc., 305 NLRB 6 (1991), enfd. 972 F.2d 222 (8th Cir. 1992); Bechtel Power Corp., 301 NLRB 1066, 1072 (1991); Am. Mfg. Co. of Texas, 167 NLRB 520 (1967). The compliance officer may borrow elements from the suggested formula of each party to account for conditions described in the evidence and thereby meet the objective of accurately reconstructing back pay amounts. Performance Friction Corp., 335 NLRB at 1117, citing Hill Transp. Co., 102 NLRB 1015, 1020 (1953).

Here, the Respondent complied with the Compliance Officer's directive to write to each of the Charging Parties and to post notices as directed by the Board's Order. However, the Respondent did not comply with the Board's Order to recalculate, properly and accurately, the distribution of the $375,000.00 arbitration award and pay the Charging Parties the amount due them after proper recalculation of the award. Rather, the Respondent failed to set forth any

methodology or formula for distributing the award. Instead, the Respondent merely repeated its argument that the Charging Parties had failed to show that they lost overtime opportunities or were owed any proceeds from the award. As the Compliance Officer noted, the Board had already addressed and rejected this argument. The Board's Order noted that the arbitrator's decision had "expressly covered all the pharmacists in the bargaining unit" and thus, Respondent's claim that Provident pharmacists were not entitled to any of the proceeds is without merit.

The Respondent argues that the Compliance Order should not have used a formula that assumed all bargaining unit pharmacists overtime hours were adversely affected. However, the Compliance Officer properly resolved the uncertainty of determining the exact amount of overtime hours lost against the Respondent. Where absolute precision or predictability is impossible, uncertainties will be resolved against the respondent, whose misconduct is responsible for that uncertainty. Alaska Pulp Corp., 326 NLRB at 523; NLRB v. Miami Coca Cola Bottling Co., 360 F. 2d 529 (5th Cir. 1966); IBEW, Local 70, 265 NLRB 220 (1982). Thus, it was reasonable for the Compliance Officer to make use of a formula that assumed all bargaining unit pharmacists lost overtime hours since it was impossible to determine with absolute precision the amount of overtime that each bargaining unit employee lost during the back pay period.

The Charging Parties argue that the data used by the Compliance Officer was flawed because it included the overtime hours that Leonard allegedly worked in 1999 and the overtime hours of Stroger pharmacists who have already received a portion of the arbitration award. However, the Charging Parties did not submit evidence indicating what they believe to be the actual number of overtime hours that Leonard worked in 1999. Thus, the Compliance Officer

properly used the only data before him to determine the total number of overtime hours worked. Also, neither the ALJ's Decision and Order nor the Board's Order restricted the proceeds of the arbitration award to the Charging Parties. The ALJ and the Board determined that the Respondent violated the Act by excluding the Charging Parties from receiving any proceeds from the arbitration award. The ALJ and the Board did not determine that the Charging Parties were entitled to all of the proceeds from the award. The record does not show that the Charging Parties were the only bargaining unit employees harmed by the Employer's conduct. Likewise, the Charging Parties' argument that the award should be recalculated using the Compliance Officer's formula but excluding the overtime hours of employees other than Charging Parties is without merit.

The Charging Parties also argue that the formula used by the Compliance Officer is "purely speculative." The Compliance Officer himself noted that the formula "rests on the speculative assumption that past history is an accurate predictor of future work history." However, the choice of formula for computing back pay "need not (and, normally, could not) reach an exactly 'correct' result." IBEW, Local 70, 265 NLRB at 225, citing NLRB v. Rice Lake Creamery Co., 365 F.2d 888 (D.C. Cir. 1966); NLRB v. Brown & Root, Inc., 311 F.2d 447, 452-53 (8th Cir. 1963). Where it is difficult to determine precisely the amount of back pay which should be awarded to an employee, "the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations." Brown & Root, Inc., 311 F. 2d at 452, citing NLRB v. E. Texas Castings Co., 255 F.2d 284 (5th Cir. 1958); NLRB v. Kartarik, Inc., 227 F.2d 190 (8th Cir. 1955); Marlin-Rockwell Corp. v. NLRB, 133 F. 2d 258 (2nd Cir. 1943). Here, the Compliance Officer attempted to closely approximate the amount of overtime hours that would have been worked by the Charging Parties had the

Employer not violated the collective bargaining agreement. The Compliance Officer properly looked to each individual Charging Party's past history of overtime earnings and projected those over the back pay period. The formula he used was reasonably designed to reconstruct the amount of overtime that might have been earned by the bargaining unit employees but for the Employer's use of non-bargaining unit personnel.

Further, the Charging Parties' argument that the award should be evenly divided between the Charging Parties is without merit since it would place some of the Charging Parties in a better position, and others in a worse position, than they would have occupied had the Respondent properly distributed the award originally. As noted, the purpose of the back pay order in this case is to restore the Charging Parties to the position they would otherwise occupy but for the Respondent's mishandling of the arbitration award. Sure-Tan, 467 U.S. at 899.

The Charging Parties also argue that the Compliance Officer erroneously calculated the amounts due to the Charging Parties based on a total award and interest of $201,140.80, when the total award and interest was actually $534,015.10 plus interest. This argument is without merit. As clearly stated in the Compliance Order, the Compliance Officer calculated the amounts due to the Charging Parties based on the total arbitration award of $375,000.00. The Charging Parties may be attempting to argue that the total amount the Compliance Officer awarded to the Charging Parties does not equate to $375,000.00. However, as stated previously, the Board's Order did not restrict the proceeds of the award to the Charging Parties. Thus, the Compliance Officer properly calculated the amounts due to the Charging Parties based on a total award of $375,000.00.

As a result of the Charging Parties' failure to set forth an equitable formula and the Respondent's failure to set forth any formula for redistributing the award, the Compliance

Officer was obligated to develop a formula that would properly and accurately distribute the award. The Compliance Officer attempted to obtain the overtime hours worked by each bargaining unit employee during the relevant time period. However as he noted, the Employer did not maintain records identifying whether employees who worked overtime did so at Provident or at Stroger Hospital. Further, the Compliance Officer noted that even if this information were available and fully analyzed, it would be virtually impossible to create a formula that could predict the amount of overtime lost with any degree of precision. Thus, the Compliance Officer reasonably relied on the projection of average earnings formula to arrive at an approximation of the overtime hours worked during the relevant time period.

The Respondent and the Charging Party have failed to present evidence showing that the Compliance Officer's use of the average earnings formula was in any way inappropriate or erroneous. In addition, neither party has urged the use of an equally reasonable, accurate, and equitable formula to determine the number of overtime hours the Charging Parties most probably would have worked during the back pay period. Thus, I find that the Compliance Officer properly and accurately recalculated the distribution of the arbitration award, and as a result correctly determined the amount of back pay and interest due to the Charging Parties.

V. RECOMMENDED ORDER

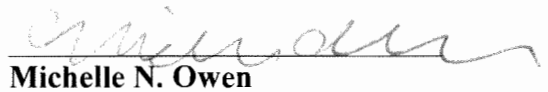
I recommend that the Respondent comply with the Compliance Order as written, modified only to the extent necessary to reflect the amount due to Christina Ohaeri-Enyzeau and to reflect the additional interest which has accumulated on the amounts due to the Charging Parties.

VI. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois on this 17th day of October, 2013.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL



Michelle N. Owen
Administrative Law Judge

Appendix A

Name	Overtime Hours 1999	Overtime Hours 2000	Overtime Hours 2001	Overtime Hours 2002	Overtime Hours 2003	Overtime Hours 2004	Overtime worked %	$ of Overtime Dollars	$ of Interest	Total $
Joseph Arrington	890	998.8	604.4	579.8	320.2		6.68%			
George Leonard	2311.2	1791.2	968.2	841.3	1888.7	2320.3	17.35%			
Kiran Nanavati	1240.9	1518.9	637.2	727.4	1645.9	2220.9	9.31%			
Simeon Okonmah	797.9	913	426.9	828.8	1815.5	2036	5.99%			
Haita Thakkar	1315.9	1481.7	1248.6	1236.1	1763.8	1487	9.88%			
Hillard Moore	1311.9	1087.5	1014	982.4	513	0	9.85%			
Denice Davis	806.5	1377.9	871.7	869.8	903.7	982.6	6.05%			
Frederick Carter	*	*	*	*	*	*				
Marshall Berry	796	655.6	301.1	323.4	193.3	594	5.97%	$22,387.50	$10,005.55	$32,393.50
Ashok Ghandi	*	*	176.4	1131	1499.1	1609.5	5.59%	$20,587.50	$9,201.08	$29,788.58
Dhirajlal Jagatia	367.2	282.6	246.7	296.1	426.7	146.4	2.76%	$10,350.00	$4,624.68	$14,975.68
Brian McBride	129.9	225.7	159.9	206.3	74.1	*	0.78%	$2,925.00	$1,307.26	$4,232.26
Gabriel Nwandu	662.4	558	279.5	659.1	849.8	649.7	4.97%	$18,637.50	$8,329.58	$26,966.87
Boniface Nwansei	385.6	402.8	308.1	330.5	576.2	294.1	2.89%	$10,837.50	$4,843.56	$15,681.06
Carmelethia Otis	1047.6	1066.2	1148.8	1227.1	1295.5	1355.9	7.86%	$29,475.00	$13,173.13	$42,648.13
Delcina Simmons Rosado	779.4	735.7	720.3	644.8	797.3	659.3	5.85%	$21,937.50	$9,804.43	$31,741.93
Synthia Miller	*	*	*	39.1	210.6	*	0.05%	$1,875.00	$837.99	$2,712.99
Linda Hampton **	163.4	125.9	87.7	109.1	94.6	129.3	1.23%			
Nayan Raval **	318.4	423.2	260.1	416	514.1	287.3	2.39%			
Christiania Ohaeri-Enyzeau	*	*	*	*	*	580.9				
Total	13324.2	13644.7	9459.6	11448.1	15382.1	15353.2				

* No data provided

** Withdrew claim as a Charging Party